IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0237
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
JONATHON GEORGE AMMON,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20051645

Honorable Ted B. Borek, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and David A. Sullivan — Tucson
Attorneys for Appellee

Robert J. Hooker, Pima County Public Defender
By Frank P. Leto — Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 Appellant Jonathan Ammon was convicted after a jury trial of one count of aggravated driving with an illegal drug or its metabolite in his system while his license was suspended, revoked, or in violation of a restriction, a class four felony. The court found

Ammon had two prior felony convictions and sentenced him to a presumptive, ten-year term of imprisonment. On appeal, Ammon contends the trial court erred by refusing to instruct the jury on a lesser-included offense, denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., and by imposing the presumptive sentence. We see no reversible error and affirm his conviction and sentence.

Factual and Procedural Background

¶2 We view the facts and any reasonable inferences therefrom in the light most favorable to sustaining the convictions. *State v. Henry*, 205 Ariz. 229, ¶ 2, 68 P.3d 455, 457 (App. 2003). In February 2004, Pima County Sheriff's Deputy Nickell observed a brown pickup truck fail to stop for a stop sign before making a left turn. Nickell initiated a traffic stop and noticed that Ammon, who could not provide a driver's license, exhibited various signs and symptoms of intoxication, including a strong odor of intoxicants, red, watery and bloodshot eyes, and mood swings. Nickell called for backup from an officer trained to investigate impaired drivers.

¶3 Deputy Phaneuf responded and also observed signs and symptoms of intoxication, including "the strong odor of intoxicants coming from [Ammon's] breath," red, watery bloodshot eyes, the fact Ammon needed to grasp the door frame with both hands when getting out of the truck, mood swings, slow and mumbled speech, and a noticeable sway when he stood. Phaneuf also noted Ammon's body movements were rapid and "very jittery." Nickell conducted a horizontal gaze nystagmus (HGN) test on Ammon, which

produced cues of impairment. Phaneuf conducted a field sobriety test, the one-leg stand; Ammon displayed three out of four cues indicating impairment before Phaneuf "discontinued [the test] because [Ammon] got very agitated." Phaneuf then performed a preliminary breath test, which "showed the presence of alcohol," and placed Ammon under arrest.

¶4 Phaneuf asked Ammon to submit to a blood test as required by A.R.S. § 28-1321; Ammon refused and Phaneuf transported him to the Department of Public Safety (DPS) headquarters to have blood drawn.[1] Ammon was placed in a holding cell while Phaneuf sought a warrant. After the warrant was granted, the DPS phlebotomist drew a sample of Ammon's blood. The test results showed Ammon had alcohol, cocaine, and benzoylecgonine or b.e., a metabolite produced as the body breaks down cocaine, in his blood. His blood alcohol concentration (BAC) was .048.

¶5 Ammon was indicted on one count each of aggravated driving under the influence of an intoxicant while his license was suspended, revoked, or in violation of a restriction, and aggravated driving with an illegal drug or its metabolite in his system while his license was suspended, revoked, or in violation of a restriction, both class four felonies. The charge of driving under the influence of an intoxicant was dismissed during trial on

[1]Section 28-1321(A), A.R.S., provides for several different types of tests to determine alcohol concentration, however Phaneuf testified the Pima County Sheriff's Department performs only blood tests.

Ammon's motion pursuant to Rule 20, Ariz. R. Crim. P.[2] Ammon was convicted and sentenced as noted above, and this appeal followed.

Jury Instruction

¶6 Ammon first contends the trial court erred by failing to instruct the jury that driving on a suspended license was a necessarily included offense of aggravated driving with an illegal drug or its metabolite in his system (hereafter DUI) while his license was suspended or revoked. The state responds that driving on a suspended license is not a lesser-included offense of DUI with a suspended or revoked license, and thus, cannot be a necessarily included offense. We review the trial court's refusal to give a requested jury instruction for an abuse of discretion. *State v. Wall*, 212 Ariz. 1, ¶ 12, 126 P.3d 148, 150 (2006).

¶7 Rule 23.3, Ariz. R. Crim. P., requires courts to instruct the jury on offenses "necessarily included in the offense charged." *See State v. Valenzuela*, 194 Ariz. 404, ¶ 10, 984 P.2d 12, 14 (1999). Our supreme court has recently clarified that "a 'lesser included' offense is not always a 'necessarily included' offense." *Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d at 150; *see also State v. Dugan*, 125 Ariz. 194, 195, 608 P.2d 771, 772 (1980) ("The words 'necessarily included' found in Rule 23.3 are not synonymous with the words 'lesser included.'"). "[A]n offense is 'necessarily included,' and so requires that a jury instruction

[2]The trial court cited Ammon's BAC as the reason for dismissal despite the evidence of Ammon's impairment when he was stopped.

be given, only when it is lesser included *and* the evidence is sufficient to support giving the instruction." *Wall*, 212 Ariz. 1, ¶ 14, 126 P.3d at 150. In *Wall*, the court first determined attempted theft was a lesser-included offense of attempted robbery under Arizona law and only then evaluated the evidence supporting the requested instruction. *Id*. ¶18.

¶8 An offense is a lesser-included offense of another when it is impossible to be convicted for the greater offense without having committed the lesser, or when the charging document actually describes the lesser offense, regardless of whether the conduct described is necessary for a conviction of the greater offense.[3] *See State v. Robles*, 213 Ariz. 268, ¶ 5, 141 P.3d 748, 750-51 (App. 2006). Arizona courts have previously held that driving with a suspended license is not a lesser-included offense of aggravated driving with an illegal drug in the body while the driver's license is suspended or revoked. *Id*. ¶ 6; *State v. Brown*, 195 Ariz. 206, ¶ 6, 986 P.2d 239, 241 (App. 1999). Ammon concedes these cases exist, but contends they are wrongly decided and encourages us not to follow them.

¶9 Section 28-1381(A)(3), A.R.S., provides: "It is unlawful for a person to drive or be in actual physical control of a vehicle in this state . . . [w]hile there is any drug defined

[3]It is axiomatic that a defendant may only be convicted of offenses either described in his charging document or inherent in those offenses that are described. *See State v. Cummings*, 148 Ariz. 588, 590, 716 P.2d 45, 47 (App. 1985); *State v. Mikels*, 119 Ariz. 561, 563, 582 P.2d 651, 653 (App. 1978); Ariz. Const. art. II, § 30 ("[n]o person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment").

in § 13-3401 or its metabolite in the person's body."[4] If a person violates § 28-1381(A)(3) while their "driver license or privilege to drive is suspended, canceled, revoked or refused," the offense becomes aggravated DUI pursuant to A.R.S. § 28-1383(A)(1). In contrast, A.R.S. § 28-3473(A), A.R.S., defines driving on a suspended license as: "driv[ing] a motor vehicle on a public highway when the person's privilege to drive a motor vehicle is suspended, revoked, canceled or refused." The differences in the statutes are readily apparent. DUI can be committed by maintaining "actual physical control" of a vehicle while not actually driving. A.R.S. § 28-1381(A); *see State v. Love*, 182 Ariz. 324, 327, 897 P.2d 626, 629 (1995) (conviction possible if motorist was driving or in actual physical control while under the influence of intoxicating substances); *Brown*, 195 Ariz. 206, ¶ 6, 986 P.2d at 241; *State v. Vermuele*, 160 Ariz. 295, 297, 772 P.2d 1148, 1150 (App. 1989) (actual physical control exists when defendant "readily capable of placing [the] vehicle into the stream of traffic").

¶10 Furthermore, the DUI statute does not require the vehicle to be located on "a public highway," § 28-3473(A), but only "in this state." A.R.S. § 28-1381(A). "[N]othing in the language of [the] statute, when read according to its common, everyday meaning, . . . restricts jurisdiction in a DUI case to a public highway." *Allen v. Girard*, 155 Ariz. 134, 136, 745 P.2d 192, 194 (App. 1987); *Brown*, 195 Ariz. 206, ¶ 7, 986 P.2d at 241. Accordingly,

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[4]Section 13-3401(20)(z), A.R.S., includes "coca leaves," which are defined to included cocaine in § 13-3401(5).

because these elements are not part of the offense of driving with a suspended license, it is possible to commit aggravated DUI with a suspended license without violating the statute that proscribes driving on a suspended license. *See Robles*, 213 Ariz. 268, ¶¶ 5-6, 141 P.3d at 750-51; *Brown*, 195 Ariz. 206, ¶ 6, 986 P.2d at 241.

¶11 We therefore determine whether the conduct described in the charging document could constitute the offense of driving on a suspended license. *See Robles*, 213 Ariz. 268, ¶ 7, 141 P.3d at 751; *Brown*, 195 Ariz. 206, ¶ 8, 986 P.2d at 241. Ammon's indictment alleges he "drove or was in actual physical control of a vehicle" without reference to where in Pima County this conduct occurred. Because this language would support a conviction for being in actual physical control but not driving, and would also support a conviction for conduct that occurred on private property, the language of Ammon's indictment cannot be read to describe driving on a suspended license. *See Robles*, 213 Ariz. 268, ¶ 7, 141 P.3d at 751; *Brown*, 195 Ariz. 206, ¶ 8, 986 P.2d at 241.

¶12 Ammon contends, however, we should review the evidence presented to the grand jury, insisting it demonstrates, as did the evidence presented at trial, that he had actually been driving on a public street when he was stopped. He relies on *State v. Magana*, 178 Ariz. 416, 874 P.2d 973 (App. 1994), to support this claim.[5] There, Division One of this

[5]Ammon also cites *State v. Mikels*, 119 Ariz. 561, 563, 582 P.2d 651, 653 (App. 1978), and *State v. Cummings*, 148 Ariz. 588, 590, 716 P.2d 45, 47 (App. 1985), but both of those cases required the court to determine whether the defendant had been convicted of a specific offense for which he had not been indicted, not what offenses were properly lesser included in the offenses charged. Ammon has not suggested he was convicted of a second

court stated that "the indictment must be read in the light of the facts known by both parties." *Magana*, 178 Ariz. at 418, 874 P.2d at 975. However, in *Robles* this court disagreed with the application of *Magana* beyond the specific circumstances in that case. *Robles*, 213 Ariz. 268, ¶ 9, 141 P.3d at 741. The question decided in *Magana* was whether reckless driving could be a lesser-included offense of second-degree murder and the court had found "the use of an automobile was implicit in [the indictment's] language." *Id*. ¶ 8. Here, it is more appropriate to follow *Robles* because there is no language in Ammon's indictment indicating he had actually been driving on a public street when he committed aggravated DUI. *See id.* ¶ 7; *Brown*, 195 Ariz. 206, ¶ 10, 986 P.2d at 242 (charging document determines the issue).

¶13 Furthermore, as our supreme court pointed out in *Wall*, "the jury must be able to find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense." 212 Ariz. 1, ¶ 18, 126 P.3d at 151; *see State v. Celaya*, 135 Ariz. 248, 253, 660 P.2d 849, 854 (1983) (defendant entitled to instruction under Rule 23.3 only when evidence reasonably supports it). There was no evidence that Ammon ingested the cocaine after he drove and while in police custody. "The mere possibility that the jury might choose to disbelieve a portion of the state's case . . . does not require the court to instruct on a lesser-included offense." *State v. King*, 166 Ariz. 342, 343, 802 P.2d 1041, 1042 (App. 1990); *see also Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d at 151 ("[i]t is not enough that, as a theoretical matter, '"the jury might simply disbelieve the state's

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offense not presented to the grand jury but described during his trial.

evidence on one element of the crime"""), *quoting State v. Caldera*, 141 Ariz. 634, 637, 688 P.2d 642, 645 (1984), *quoting State v. Schroeder*, 95 Ariz. 255, 259, 389 P.2d 255, 258 (1964). We therefore cannot say the trial court abused its discretion by refusing to give an instruction defining driving on a suspended license as a necessarily included offense of Ammon's DUI charge.

Rule 20 Motion

¶14 Ammon next asserts the trial court wrongly denied his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., and that there was insufficient evidence to support his convictions. We review the trial court's ruling on a motion for judgment of acquittal for an abuse of discretion. *Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d at 458. Every conviction must be based on "substantial evidence," Rule 20(a), Ariz. R. Crim. P., that is, evidence "which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). If reasonable people could differ about whether the evidence establishes a fact that is in issue, that evidence is substantial. *State v. Atwood*, 171 Ariz. 576, 597, 832 P.2d 593, 614 (1992). We will reverse a conviction for insufficient evidence "only if 'there is a complete absence of probative facts to support [the trial court's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶15 Ammon contends the state presented insufficient evidence that he had cocaine in his system while he was driving, suggesting that because the state's criminalist could not specify when he had ingested the cocaine, "there was time for the metabolite [to] be placed in Mr. Ammon's system after his driving" but before his blood test. But Deputy Phaneuf testified about Ammon's behavior during the stop. He said Ammon's physical movements were "very jittery" and "rapid," Ammon displayed sudden anger, became so agitated Phaneuf had to stop the one-leg stand test, and behaved aggressively at times during the stop, including clenching his fists and staring at the deputies. Phaneuf testified that jittery and rapid movements, extreme agitation, Ammon's fist clenching and "jumpy" behavior were not signs and symptoms of alcohol consumption. Phaneuf additionally testified he had initially patted Ammon down and later performed a more thorough search, which included a search of Ammon's pockets, incident to Ammon's arrest. Phaneuf estimated the drive to the DPS headquarters had taken about five minutes and Ammon had been in the holding cell an additional ten minutes, alone the entire time.

¶16 DPS criminalist Olander testified cocaine completely metabolizes out of the body in about five hours, while the benzoylecgonine metabolite remains for between twenty and twenty-five hours. The body begins producing benzoylecgonine shortly after the cocaine is ingested. She also stated cocaine users experience two stages of effects: stimulation and depletion. The stimulation stage lasts "about half an hour up to a couple of hours at the most" and is characterized by excitability, euphoria, and an inability to focus, while depletion

creates symptoms including dysphoria, fatigue, central nervous system depression, dizziness, drowsiness, and an inability to concentrate. Aggression and mood swings may also result from cocaine ingestion. Olander additionally testified that one result of the ingestion of alcohol and low doses of cocaine together can be that the effects of each substance may offset each other.

¶17 In view of this evidence, a reasonable jury could have concluded that Ammon had cocaine and/or its metabolite benzoylecgonine in his system at the time he was driving. *See Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d at 394. Thus, the trial court did not abuse its discretion when it denied Ammon's motion and submitted the case to the jury. *See Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d at 458.

Presumptive Sentence

¶18 Ammon contends the trial court erred in imposing the presumptive prison term. Relying entirely upon the trial court's statement at sentencing that it was "bound to impose the presumptive sentence in this case," he argues "[t]he court's failure to exercise statutory discretion [was] an abuse requiring a remand for resentencing or [sentence] reduction." The state responds that Ammon's argument lacks merit because the record demonstrates the court properly considered all aggravating and mitigating factors at sentencing. We review a trial court's imposition of a sentence within the statutory limits for an abuse of discretion. *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). "Provided the trial court fully

considers the factors relevant to imposing sentence, we will generally find no abuse of discretion." *Id*.

¶19 Ammon maintains that because the trial court discussed mitigating circumstances, but used the word "bound" in its oral pronouncement of sentence, the court committed fundamental error.[6] However, reading the court's comments in context, immediately following a thorough discussion of all potential sentencing factors, both aggravating and mitigating, the comment can be viewed as merely an unfortunate choice of words used to indicate that the factors did not justify either aggravating or mitigating Ammon's sentence. The trial court noted Ammon's two prior felonies, "a number of other misdemeanors," and "the circumstance[] of going through a stop sign" as aggravating factors. In mitigation, the court noted Ammon's age, health, family support, and ability to work. Although Ammon cites his willingness to accept responsibility as a mitigator, the trial court found that offset by his statements in the presentence report that he had not taken the cocaine until after he was stopped. Indeed, the trial court stated "the record has to be considered aggravating" but nevertheless imposed a presumptive sentence.

¶20 We presume the court considered all the relevant evidence presented to it at sentencing. *Cazares*, 205 Ariz. 425, ¶ 7, 72 P.3d at 357; *State v. Medrano*, 185 Ariz. 192, 196, 914 P.2d 225, 229 (1996). Although a sentencing court must consider evidence offered

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[6]We dispense with any fundamental error analysis in view of our determination that no error, fundamental or otherwise, occurred. *See State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1991).

in mitigation, it is not required to find the evidence mitigating. *State v. Long*, 207 Ariz. 140, ¶ 41, 83 P.3d 618, 626 (App. 2004); *Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357 ("The weight to be given any factor asserted in mitigation rests with the trial court's sound discretion."). "[E]ven when only mitigating factors are found, the presumptive term remains the presumptive term unless the court, in its discretion, determines that the amount and nature of the mitigating circumstances justifies a lesser term." *State v. Olmstead*, 213 Ariz. 534, ¶ 5, 145 P.3d 631, 632 (App. 2006).

¶21 Ammon relies on *State v. Fillmore*, 187 Ariz. 174, 927 P.2d 1303 (App. 1996), and *State v. Garza*, 192 Ariz. 171, 962 P.2d 898 (1998), to support his contention. But in both of those cases, the trial court imposed consecutive sentences it believed were "extravagant," *Fillmore*, 187 Ariz. at 185, 927 P.2d at 1314, or "excessive," *Garza*, 192 Ariz. 171, ¶ 15, 962 P.2d at 902, under the circumstances, leading to the appellate conclusion the trial court apparently had not understood that it had the discretion to impose concurrent sentences resulting in much shorter terms of imprisonment. *See Garza*, 192 Ariz. 171, ¶¶ 5, 18, 962 P.2d at 900, 903 (sentence imposed totaled 26.25 years but concurrent sentences would have totaled 10.5 years); *Fillmore*, 187 Ariz. at 184-85, 927 P.2d at 1313-14 (consecutive sentences of 289.75 years imposed over state's recommendation of concurrent 15.75 year terms).

¶22 We decline Ammon's invitation to read the trial court's statement at sentencing as anything but a truncated expression of the court's determination that there were not

sufficient aggravating or mitigating factors to deviate from the presumptive sentence. *See Medrano*, 185 Ariz. at 196, 914 P.2d at 229 ("We will not presume that the trial court created a contrary rule of law and silently applied it."); *Olmstead*, 213 Ariz. 534, ¶ 5, 145 P.3d at 632. Because the court had before it and obviously considered all the relevant information before imposing sentences within the statutory range, we cannot say it abused its discretion in sentencing Ammon to the presumptive term. *See Cazares*, 205 Ariz. 425, ¶¶ 6-7, 72 P.3d at 357.

Disposition

¶23 Ammon's conviction and sentence are affirmed.

PHILIP G. ESPINOSA, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge